

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON  
PORTLAND DIVISION

KYLE OSBORNE,

2:11-CV-00080-SU

Plaintiff,

ORDER

v.

CITY OF BURNS, OREGON,  
a Municipal Corporation;  
LEN VOHS; DON MUNKERS;  
RANDY COOK; DON HOKE; and  
CRAIG LaFOLETTE,

Defendants.

BROWN, Judge.

Magistrate Judge Patricia Sullivan issued Findings and Recommendation (#18) on February 27, 2012, in which she recommends this Court grant in part and deny in part Defendants' Motion (#8) for Summary Judgment. The matter is now before this Court pursuant to 28 U.S.C. § 636(b)(1)(B) and Federal Rule of

Civil Procedure 72(b).

Because no objections to the Magistrate Judge's Findings and Recommendation were timely filed, this Court is relieved of its obligation to review the record *de novo*. *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9<sup>th</sup> Cir. 2003) (*en banc*). See also *United States v. Bernhardt*, 840 F.2d 1441, 1444 (9<sup>th</sup> Cir. 1988). Having reviewed the legal principles *de novo*, the Court does not find any error.

The Court notes the Magistrate Judge's conclusion that Plaintiff brings his § 1983 claims against Defendants in their individual as well as in their official capacity is further underscored by the fact that in their Answer, Defendants asserted the affirmative defense of qualified immunity, which applies only to municipal employees acting in their individual capacities. See, e.g., *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1060-61 (9<sup>th</sup> Cir. 2006).

In addition, the Court notes the Magistrate Judge's recommendation that the Court grant Defendants' Motion for Summary Judgment as to Plaintiff's equal-protection claim is further bolstered by the fact that Plaintiff fails to point to any evidence in the record that he was treated differently from similarly-situated individuals. See, e.g., *Thornton v. City of St. Helens*, 425 F.3d 1158, 1167 (9<sup>th</sup> Cir. 2005) (Even with class-of-one, equal-protection claims a "plaintiff still bears the

burden of proving that [h]e has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment."); *Westwood v. City of Hermiston*, 787 F. Supp. 2d 1174, 1203-4 (D. Or. 2011) ("A plaintiff [alleging a violation of his right to equal protection] must allege sufficient facts to indicate that his comparators were similarly situated in all relevant respects.") (quoting *Johnson v. Goddard*, No. CV-07-0175-PHX-FJM, 2007 WL 2701951, at \*2 (D. Ariz. Sept. 13, 2007)).

#### CONCLUSION

The Court **ADOPTS** Magistrate Judge Sullivan's Findings and Recommendation (#18). Accordingly, the Court:

- (1) **GRANTS** Defendant's Motion (#8) for Summary Judgment as to Plaintiff's claims against Defendant City of Burns;
- (2) **GRANTS** Defendant's Motion (#8) for Summary Judgment as to Plaintiff's equal-protection claim;
- (3) **GRANTS** Defendant's Motion (#8) for Summary Judgment as to Plaintiff's claim for violation of the Fourth Amendment;
- (4) **GRANTS** Defendant's Motion (#8) for Summary Judgment as to Plaintiff's claim for violation of the Fifth Amendment;
- (5) **GRANTS** Defendant's Motion (#8) for Summary Judgment as

to Plaintiff's claim for violation of his rights under the Fourteenth Amendment to due process;

- (6) **GRANTS** Defendant's Motion (#8) for Summary Judgment as to Plaintiff's claim for conspiracy in violation of his rights under the Fourteenth Amendment;
- (7) **GRANTS** Defendant's Motion (#8) for Summary Judgment as to Plaintiff's state-law claims;
- (8) **GRANTS** Defendant's Motion (#8) for Summary Judgment with respect to Defendants Hoke, Munkers, and LaFolette for violation of Plaintiff's rights under the First Amendment; and
- (9) **DENIES** Defendant's Motion (#8) for Summary Judgment with respect to Defendants Cook and Vohs for violation of Plaintiff's rights under the First Amendment.

Accordingly, this matter proceeds only against Defendants Cook and Vohs only as to Plaintiff's claim for violation of his rights under the First Amendment.

IT IS SO ORDERED.

DATED this 19<sup>th</sup> day of March, 2012.

  
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ANNA J. BROWN  
United States District Judge